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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 12 1995

REPLY TO THE ATTENTION OF:

C-29A

Priscilla Wilfarht
Field Solicitor
U.S. Department of the Interior
Office of the Solicitor
Bishop Henry Whipple Federal Building, Room 686
Ft. Snelling, MN 55111-4007

Re: Application of Hagen v. Utah to Mille Lacs Reservation

Dear Ms. Wilfarht:

Congratulations on your recent appointment to the position of Field Solicitor. I hope that the spirit of forthright collaboration that I enjoyed with Lynn Peterson while she served in my office continues as the Office of Regional Counsel and the Office of the Solicitor work together to resolve the many complex issues that face us in addressing environmental protection for the Indian country of the Great Lakes area. I was pleased to learn from Marc Radell of my staff that our offices established a positive start to this end at the October 27, 1994 inter-agency meeting regarding the Federal trust responsibility and reservation wetlands.

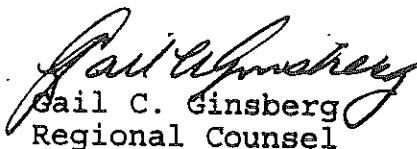
The specific purpose of this letter is to request your opinion on the application of Hagen v. Utah, 510 U.S. - , 127 L. Ed. 2d 252 (1994) [enclosed], to the status of the reservation of the Mille Lacs Band of Minnesota Chippewa. In 1989, the State of Minnesota raised a competing claim of jurisdiction regarding the Band's request to be "treated as a State" for water protection programs within the Mille Lacs Reservation. Such treatment, if approved by EPA, would allow the Band to operate Clean Water Act and Safe Drinking Water Act programs on the Reservation in the same manner that States operate such programs in areas subject to State jurisdiction. See 33 U.S.C. § 1377(e) and 42 U.S.C. § 300j-11. In 1989, EPA determined that the State's objection was not yet ripe, as the Band had not applied for a regulatory program. In 1992, the Mille Lacs Band applied to EPA for authorization to implement the Safe Drinking Water Act's Underground Injection Control program on the reservation. After consultation with EPA's Office of General Counsel and the Office of the Solicitor (including David Etheridge and Mark Anderson), I determined, by means of a September 25, 1993 memorandum [enclosed], that the Mille Lacs Band is the appropriate authority to implement the UIC program in lieu of the EPA within the historic boundaries of the Mille Lacs Reservation.

One of the bases for the State of Minnesota's competing claim of jurisdiction is that the boundaries of the Reservation established by the February 22, 1855 treaty between the United States and the Mississippi, Pillager and Lake Winnibigoshish Bands of Chippewa Indians, 10 Stat. 1165, were diminished by the Treaty of 1864, 13 Stat. 85, and the Nelson Act, 25 Stat. 642 (1889). Based in large part upon Solem v. Bartlett, 465 U.S. 463 (1984), and Federal district court decisions regarding the status of the Leech Lake, Red Lake and White Earth reservations, Mark Anderson of your office determined in a February 28, 1991 letter to the Minneapolis Area Director [enclosed] that the Mille Lacs Reservation had not been diminished by the 1864 Treaty or the Nelson Act. As you know, Solem confirms that the Supreme Court examines three factors in determining whether an Act of Congress diminishes a reservation: 1) the statutory language; 2) the historical context surrounding passage of the Act; and 3) the character of the opened areas, i.e., who actually moved there: Indians or non-Indians.

On February 23, 1994, the Supreme Court decided Hagen v. Utah, which uses the Solem "test." Hagen could be read to place more emphasis on the third factor. I believe the expertise of your office would be helpful in determining the applicability of this third factor to the Mille Lacs Reservation. Such factual issues as whether any Mille Lacs Indians took their allotments in open areas, whether the Band has acquired any interests in the open areas and whether the State or Band has exercised jurisdiction in the open areas, as well as the proper weight to be given such facts, could best be addressed by the Department.

Thank you for your attention to this matter. If you have any questions or comments, please contact me at 312/886-6675 or Marc Radell at 312/886-7948.

Sincerely,


Gail C. Ginsberg
Regional Counsel

bcc: M. Radell
E. Johnson-Schultz, W-15J
R. Dubois, OGC
J. Havard, OGC

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